United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7245

United States Court of Appeals

For the Second Circuit

B

J. P. FOLEY & CO., INC., JOHN P. FOLEY, ANNE A. FOLEY and ANITA SALISBURY,
Plaintiffs-Appellees,

against

OLIVER D. VANDERBILT, JAMES B. RAMSEY, JR., THOMAS MCNELL, BRUCE RAYMOND, RICHARD MCDERMOTT, WILLIAM GROSSCRUGER, FRANK LYNCH, GEORGE MORPURGO, MELVILLE H. IRELAND, JAMES J. RUSH and BLAIR & CO., INC.,
Defendants,

ARTHUR YOUNG & COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR APPELLEES

MILBERG & WEISS
Attorneys for Plaintiffs-Appellees John P. Foley, Jr. et al.
One Penn Plaza
New York, New York 10001
(212) 594-5300

Of Counsel:
MELVYN I. WEISS
LAWRENCE MILBERG
SAMUEL H. TURETSKY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Sources

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Docket No. 75-7245

J. P. FOLEY & CO., INC., JOHN P. FOLEY, ANNE A. FOLEY and ANITA SALISBURY,

Plaintiffs-Appellees,

against

OLIVER D. VANDERBILT, JAMES B. RAMSEY, Jr., THOMAS McNELL, BRUCE RAYMOND, RICHARD McDERMOTT, WILLIAM GROSSCRUGER, FRANK LYNCH, GEORGE MORPURGO, MELVILLE H. IRELAND, JAMES J. RUSH and BLAIR & CO., INC.,

Defendants,

ARTHUR YOUNG & COMPANY,

Defendant-Appellant.

BRIEF OF APPELLEES JOHN P. FOLEY, JR., et al.

Preliminary Statement

Defendant-Appellant Arthur Young & Company ("appellant Young") appeals an order of the Honorable Charles H. Tenney of the United States District Court for the Southern District of New York, entered April 16, 1975; which denied appellant Young's motion to disqualify the law firm of Milberg & Weiss from further participation

as attorneys in this action for Plaintiff-Appellees, John P. Foley, Jr., his wife, Anne A. Foley, J. P. Foley & Co., Inc. and Anita Salisbury ("appellees"). The order of the District Court, which has not yet been reported, is set forth between pages 136a-140a of the Joint Appendix.*

Appellant Young's motion was based on a misapplication of Disciplinary Rules 5-101(B) and 5-102(A), of Canon 5 of the Code of Professional Responsibility, to the circumstances of this case -- and on erroneous descriptions of attorney Leonard Feldman's status with the law firm of Milberg & Weiss and his role in this litigation. The District Court denied Young's motion and its decision should not be reversed or modified.

Issues

1. Did the District Court properly deny appellant Young's motion for disqualification of appellees' law firm where an attorney who is "counsel" to that firm may only be called in rebuttal to defendants' case, will not participate in any other way in the trial of the action, has no pecuniary interest in its outcome and his status need not be revealed to the trier of fact?

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* Page references are to the Joint Appendix.

2. Is an attorney who is "counsel" to a law firm "in the firm" for the purposes of DR 5-101(B) and 5-102(A) where he and the law firm have separate and distinct clients, he will not share in any fee earned by the law firm in the trial of the action, does not regularly share fees with the law firm and the law firm was never consulted by him in regard to and took no part whatever in the subject transaction?

3. Assuming that an attorney who is "counsel" to a law firm may not conduct the trial of an action because he may appear as a rebuttal witness on behalf of the law firm's client, is the law firm per se disqualified from conducting the trial of the action where the attorney will not in any way participate as an advocate at the trial?

4. Does a law firm which has handled an action and is fully familiar with the voluminous and complicated transcripts, documents and issues underlying the action to the eve of trial have such "distinctive value" to its clients in the action so that its disqualification creates undue hardship to its clients?

Statement of Facts

On the afternoon of Friday, April 3, 1970, appellees subordinated securities of a then value of approximately $3 million with Blair & Co., Inc. ("Blair"), a member of the New York Stock Exchange ("the Stock Exchange")

and the American Stock Exchange ("Amex") (90a, P. 11). On the morning of Monday, April 6, 1970, the first business day following the closing, a liquidation of Blair's insider subordinated securities, including those belonging to appellees, directed by the Stock Exchange, commenced and led to the loss of all appellees' securities (90a, P. 11). Blair was thereafter liquidated under the auspices of the Bankruptcy Court.

In 1970, appellees brought this action, pursuant to the Securities Exchange Act of 1934 and common law principles, against Blair, its auditor, appellant Young, and certain of Blair's officers and directors.* Appellees allege that in making their subordination, they relied, inter alia, upon the accuracy of a Statement of Financial Condition of Blair prepared at the direction of the Stock Exchange and certified under the name of appellant Young. Appellees further allege that the Statement of Financial Condition failed to reveal material inadequacies in Blair's operational and financial condition previously disclosed to the Stock Exchange in a report marked "confidential."

Some five years after this action was brought, and at a time when this action is ready for trial, appellant Young moved to disqualify the law firm of Milberg & Weiss, from all further participation in this action because Leonard Feldman,

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* Appellant Young was only one of the eleven defendants served in this action to make such a motion. All the remaining defendants, who are not parties to this appeal, declined to join in appellant Young's motion.

Esq., who represented appellees in their negotiations with Blair, ought, in appellant Young's opinion, to be called as a witness on appellees' behalf. The record, however, establishes that (a) Mr. Feldman did not discuss the Foley/Blair transaction with Milberg & Weiss until five months after its consummation (134a-135a); (b) appellees were represented by Mr. Feldman alone in their dealings with Blair (91a, P. 12); (c) Mr. Feldman may only be called in rebuttal to possible attributions of knowledge by the defendants to him (84a-85a, P. 3); (d) Mr. Feldman's serious heart condition may totally preclude him from testifying (91a, P. 14); (e) Mr. Feldman has no pecuniary interest in the outcome of this litigation (85a, P. 4; 91a, P. 13; 93a-94a; 128a; 133a); and (f) appellees have stated that they will not reveal Mr. Feldman's status to the trier of fact (92a, P. 15).

In denying appellant Young's motion for disqualification, Judge Tenney declared (140a) that:

> "it is clear that defendant (appellant Young) has not made a sufficient showing to support a disqualification."

Appellant Young now seeks to overturn the ruling of the District Court.

ARGUMENT

POINT I

APPELLANT YOUNG HAS FAILED TO MAKE A SHOWING OF PREJUDICE WHICH WOULD REQUIRE A DISQUALIFICATION OF THE LAW FIRM OF MILBERG & WEISS.

A. The District Court was correct in holding that Young had not shown disqualification was proper in the present circumstances.

Disciplinary Rules 5-101(B) and 5-102(A)* provide that a lawyer should not act as trial counsel in an action if he "learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client." But in this action, as the record makes clear, no lawyer "in (the) firm" of Milberg & Weiss "ought to be called as a witness on behalf of" the appellees. Nor will any such lawyer in fact be called.

Moreover, Mr. Feldman will not try this case, or be an advocate at trial, or a member of appellees' trial counsel team. Indeed, Mr. Feldman will probably not even be present in the courtroom (because of his very serious coronary

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* These rules, referred to as an "ancient principle of legal ethics" by appellant Young (Brief, P. 5) were adopted in 1970.

condition)* -- and he certainly will not be seated at counsel's table (84a-85a, P. 3;87a-88a, P. 3;91a, P. 14;94a). This in itself serves to make DR 5-101(B) and 5-102(A) inapplicable here, for, as Judge Knapp recently noted in Molded Plastic Box Co., Inc. v. Precision Polymers, Inc., 73 Civ. 3939 (S.D.N.Y. Dec. 3, 1974), the

> "primary purpose of the provisions is to avoid prejudice at trial. The canons are concerned not only with possible prejudice to the attorney's client, but also to potential prejudice to the attorney's adversary. The latter is placed in a peculiar posture in having to deal with an opponent who is both an advocate and a material witness." (Opinion, at 5).

See also: Ethical Consideration 5-9 to DR 5-102. Accordingly, Judge Tenney properly ruled (139a-140a):

> Here, Mr. Feldman had represented plaintiffs in the transactions which led to the instant lawsuit. In this instance, however, he will take no part in the trial of the case. Even assuming arguendo that Mr. Feldman is "in the firm" of Milberg & Weiss, it appears that the possibility of his being called as a witness is slight. Plaintiffs have stated to the Court in their papers that they do not intend to call him during their

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* Appellees are advised that on May 30, 1975, Mr. Feldman suffered a coronary attack while driving his automobile, causing a collision in which he broke his leg and sustained numerous body bruises. He was listed as "critical" for nearly one week and is presently a patient in North Shore Hospital, Manhasset, New York.

> case-in-chief. The only possible need which can be foreseen at this time is the use of his testimony in rebuttal. His testimony, if needed at that time may be merely cumulative. It may be unnecessary.
>
> This case has been handled by the Milberg & Weiss firm since its inception in 1970. It has involved substantial pretrial discovery and preparation and, while the Court need not reach the question of whether a disqualification would work a substantial hardship at this time, it is clear that defendant has not made a sufficient showing to support a disqualification.

In the companion action, Foley v. New York Stock Exchange, 71 Civ. 2987 (MEL) (S.D.N.Y. June 9, 1975), brought by appellees against the Stock Exchange and Amex in respect of the same transaction in which this action is based, Judge Lasker denied an identical motion for disqualification by the Stock Exchange. In the cases where Canon 5 has been found applicable, the lawyer acting as trial counsel was also his client's chief witness. See, e.g. Dragnescu v. First National Bank of Hollywood, 502 F.2d 550 (5th Cir. 1974), cert. denied, 43 U.S.L.W. 3571 (April 21, 1975) (trial counsel was the "only person" who acted on behalf of plaintiffs in subject transaction) Cf. Molded Plastic Box Co., Inc., supra. Here, on the contrary, Leonard Feldman will have absolutely no role as counsel at trial (84a-85a, P. 3;87a-88a, P. 2-3; 94a). And far from being plaintiffs' chief witness, he will not be called as a witness during appellees' affirmative case. But even assuming that Mr. Feldman should become a witness, the prejudice-

to-adversaries with which the Rules are concerned simply cannot arise -- for Mr. Feldman will not be "both an advocate and a material witness." This is particularly true in the present circumstances because Mr. Feldman's testimony, if indeed it be required, may have to be presented through his deposition transcript because of his serious coronary condition (84a, P. 3; 91a, P. 14; 94a).

Nor can there be any prejudice to appellees themselves. Appellant Young suggests to the contrary, contending that Mr. Feldman's relationship with Milberg & Weiss could properly be disclosed to the jury to impeach his credibility (Brief, p.20).* But that would be true only if Mr. Feldman had a financial interest in the outcome of the litigation with Milberg & Weiss (cf. Dragnescu v. First National Bank of Hollywood, supra at 550 where trial counsel who served as plaintiffs' chief witness had a "fee (that) was dependent on the outcome of the case.") Mr. Feldman, however, has no such interest. He is not part of the contingency fee arrangement between appellees and the Milberg & Weiss firm; and he will not share in any fee that

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* Appellant Young's suggestion that Mr. Feldman "has his own contingency with plaintiffs (Brief, pp. 2, 14-15, 20) is incorrect and flatly contradicted by the record (91a, P. 13; 93a-94a; 133a). In fact, when deposed by appellant Young, Dr. Foley stated that "it was my understanding that I was going to pay him" for the transaction with Blair (120a).

the firm may receive. Mr. Feldman does not have a contingency agreement with appellees for the services rendered by him in the Foley/Blair negotiations or in this litigation (84a, P. 5; 91a, P. 13; 93a-94a; 107a; 120a; 128a).

In the circumstances, then, Mr. Feldman's "counsel to" relationship with Milberg & Weiss is wholly irrelevant, and need never be disclosed to the trier of fact. Appellees, in fact, are prepared (as they represented to the District Court) to stipulate thet there shall be no reference at trial to Mr. Feldman's relationship with the Milberg & Weiss firm (84a-85a, P. 3; 87a-88a, P. 3). If appellant Young is truly concerned with possible prejudice, it will do likewise. On the other hand, if appellant Young elects for its own tactical purposes to disclose Mr. Feldman's "counsel to" status at trial, then it assumes the risk of any resulting prejudice. See Galarowicz v. Ward, 119 Utah 611, 620, 230 P.2d 576, 580 (1950), where the Court admonished an attorney who attempted to disclose to the jury opposing counsel's possible participation as a witness.

Finally, of course, there remains the fact that Mr. Feldman may not appear as a trial witness at all. He definitely will not be called during appellees' affirmative case (84a, P. 3). If appellees offer his testimony at any time, it will only be in rebuttal to the defendants' proof. And, even then, his testimony may have to be introduced through deposition transcript because of his serious heart condition (84a-86a, P. 3 and 6; 87a-88a, P. 2,3). Thus, appellant Young, not appellees,

would make Leonard Feldman a necessary witness at trial. But, the appellant Young's litigation strategy should not be permitted to deprive appellees of effective representation at trial by counsel of their choice.

DR 5-101(B) and 5-102(A) are not per se Rules. Their application necessarily depends "upon the attending facts" in each case. ABA Comm. on Professional Ethics, Informal Opinion, No. 339 (November 16, 1974). The critical question when these Rules are invoked is not whether a lawyer who has some relationship with trial counsel may appear as a witness at some point in the trial, but whether the litigation can be conducted "in fairness" and the parties "properly represented" if the lawyer's testimony is offered. Wolk v. Wolk, 70 Misc. 2d 620, 333 N.Y.S.2d 942, 945 (S.Ct., Monroe Co. 1972). In Wolk the Court ruled the DR 5-102(A) did not preclude the trial counsel himself from "being compelled to testify in rebuttal to the defendants' proof." 333 N.Y.S.2d at 944. The Rule is even of less concern in our case -- for here, of course, it will not be trial counsel who appears as a rebuttal witness, but an attorney who is "counsel to" trial counsel's firm, and whose status as such will never be known to the jury unless the defendants mention it. Similarly, the Code of Professional Responsibility does not automatically require disqualification of an entire firm because an attorney "in the firm" may appear as a witness on behalf of the firm's client. For example, in Renault, Inc. v. Auto Imports, Ltd., 19 A.D.2d 814, 243 N.Y.S.2d 480 (1st Dept. 1963), aff'g, 39 Misc.2d 25, 239

N.Y.S.2d 807 (S. Ct. N.Y. Co. 1962) (Breitel, J. P.), the Appellate Division for the First Department denied a motion for disqualification of a law firm where several members would be material witnesses but the action would be tried by a "new" member. The Court declared:

> "There is no hard and fast rule that it is always improper, irrespective of the circumstances, for an attorney to appear as trial counsel in a case where his partner is a material witness (See Drinker, Legal Ethics, pp. 158-159)". 243 N.Y.S.2d at 481.

An identical motion was similarly rejected in a companion action brought in the United States District Court for the Southern District of New York. Auto Imports, Ltd. v. Renault, Inc. and Peugeot, Inc., 61 Civ. 148 (DB) (S.D.N.Y. May 14, 1963). Appellant Young's reliance on Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc., 239 F.2d 555 (2d Cir.1950), cert. denied, 355 U.S. 824 (1957) and Handelman v. Weiss, 368 F.Supp. 258 (S.D.N.Y. 1973) is misplaced. In both cases the disqualification of an attorney was extended to his firm because the attorney had obtained "confidential information" from a prior employment which the Court concluded had been "passed on" to the other members. 368 F.Supp. at 264 and 239 F.2d at 557. Such considerations have no application to present circumstances.*

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* Appellant Young's innuendo that Mr. Feldman consulted with Melberg & Weiss in respect of the Foley/Blair transaction (continued on P. 13)

B. Appellant Young's strenuous efforts to overturn Judge Tenney's ruling are without merit.

In attacking Judge Tenney's decision, appellant Young states that all the authorities relied upon by the District Court are "inapposite" (Brief, p. 8). However, the cited authorities each dealt with the precise issue of whether, in the particular circumstances of each case, the presence of an attorney, as either trial counsel or a participant in the trial, who testified on behalf of his client, created undue prejudice upon his adversary. Significantly, each of the cases found no such prejudice to exist. In City Bank of Honolulu v. Rivera Davila, 438 F.2d 1367, 1369 (1st Cir. 1971), trial counsel testified as part of his client's case in chief. In Bank of America v. Saville, 416 F.2d 265 (7th Cir. 1969), cert. denied, 396 U.S. 1038 (1970) testimony was given as part of plaintiff's case-in-chief by the attorney who handled most

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* (cont'd.)

(Brief, p. 15) finds no support in the record. (119a; 132a; 134a-135a, P. 2-3). Indeed, Dr. Foley testified (119a) that

> "the first occasion in which Milberg & Weiss was at all involved in my situation was the occasion of New York Stock Exchange arbitration at which Mr. Milberg was present."

The arbitration took place on August 12, 1970, nearly five months after the consummation of the Foley/Blair transaction (132a, 135a). Mr. Milberg has stated that it was not until that time "that I had ever heard the name 'Foley'" (135a).

of the pre-trial discovery and was "present at trial, but did not actively conduct it." Indeed, the attorney testified as to "matters contradicted" by his adversary. 416 F.2d at 272. Similarly, in United States v. Fiorillo, 376 F.2d 180 (2d Cir. 1969) this Court refused to find prejudice merely because trial counsel gave testimony. And, in Autowest, Inc. v. Peugeot, Inc., 434 F.2d 556 (2d Cir. 1970), relied upon by appellant Young, this Court refused to reverse a decision of the District Court which permitted trial counsel to testify where trial counsel's summation was "in fact supported by the record." 434 F.2d at 568.

A fortiori, where, as in the present circumstances, the attorney will have absolutely no role in the trial of the action; he has no interest in the outcome of the litigation, his status as "counsel" to appellees' law firm will not be revealed to the trier of fact, and he may very well not even appear as a witness, disqualification was properly denied.

POINT II

LEONARD FELDMAN IS NOT "IN THE FIRM" OF MILBERG & WEISS.

Jedge Tenney found that (140a)

> "it is clear that defendant (appellant Young) has not made a sufficient showing to support a disqualification."

Accordingly, the Court determined that there was no need for

it to reach the issue of whether Mr. Feldman's status as "counsel" to Milberg & Weiss placed him "in (that) firm" for purposes of DR 5-101(B) and 5-102(A) (141a).

It is respectfully submitted, however, that in the event this Court reaches that issue, Mr. Feldman should not be so regarded. In Opinion No. 381 of the New York State Bar Association, the Committee on Professional Ethics (March 26, 1975) ruled that the name of an attorney who is "counsel" to a professional corporation could not be properly included in the name of the professional corporation because the relationship of "counsel" to a law firm is not that of a "partner or fellow member" nor "that of an employee." The prohibition against the use of the name of an attorney who is "counsel" to a firm in the name of the firm assumes a determination that one who is "counsel" to a law firm is not "in the firm". Mr. Feldman is not a "partner", "fellow member", or "employee" of the law firm of Milberg & Weiss. The clients of Milberg & Weiss and Mr. Feldman are separate and distinct. Milberg & Weiss do not intend to represent or hold themselves out as representing Mr. Feldman's clients and vice versa (84a, P. 3; 85a, P. 4-5; 91a, P. 12). Mr. Feldman participated in but a few fees earned by Milberg & Weiss (not in the instant case) where he and Milberg & Weiss formally worked together (85a, P. 4-5). In respect of the present matter, Mr. Feldman will not receive any portion of the fee which may be earned by Milberg & Weiss (85a, P. 4-5; 91a, P. 13; 94a).

Appellant Young cited a portion of Mr. Feldman's deposition where he remarked that, in his opinion, any privileged papers which might be filed in the space he was then renting from Milberg & Weiss (85a, P. 4) would continue to be privileged (56a). Their conclusion that this placed Mr. Feldman in the firm is a non-sequitur. Appellant Young has assiduously avoided reference to that subsequent portion of Mr. Feldman's testimony in which he rejected the notion that he was or considered himself "in" Milberg & Weiss. Mr. Feldman testified (56a-57a):

> Q. But you would make no claim of a difference between your status with Milberg & Weiss being of counsel as compared to as if you were a partner of the firm (sic)?
>
> A. Oh, I would make a very real distinction.
>
> * * *

Mr. Feldman's status as "counsel" to Milberg & Weiss did not place him "in the firm" for purposes of DR 5-101(B) and 5-102(A).

POINT III

SUBSTANTIAL PREJUDICE WOULD RESULT TO APPELLEES FROM A DISQUALIFICATION OF MILBERG & WEISS FOR A CIRCUMSTANCE LONG KNOWN TO APPELLANT YOUNG BEFORE THE MAKING OF ITS MOTION.

The Milberg & Weiss firm has spent a substantial amount of time preparing for trial of this complex securities

fraud case. Their familiarity with this case is not open to doubt (89a, P. 6-7, 92a, P. 16-17). Their ability to manage the trial effectively is beyond question. Their disqualification as trial counsel at this late stage might well deal a fatal blow to their clients' case. In Oleck v. Fischer, 73 Civ. 146 (MEL) (S.D.N.Y. July 1, 1974), Judge Lasker ruled that trial counsel's intimate familiarity with an action satisfied the requirements of "distinctive value" set forth in the exceptions to DR 5-101 and 5-102.

We think that appellant Young recognizes these facts full well, and attempted before the District Court to use Canon 5 as an adversary weapon.* The District Court struck this down. This Court, we submit, should do the same.

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* In Redd v. Shell Oil Company (In Re Graney) ___ F.Supp. ___, 43 U.S.L.W. 2245 (D. Utah November 2, 1974), the Court, in denying a similarly late brought motion for disqualification declared:

> "The filing of a motion for disqualification drawing into question the ethical propriety of an adversary's conduct without adwquate foundation is itself improper. The sponsorship of such a motion on the eve of trial based on circumstances that had long before come to the attention of counsel is so disruptive of the judical process as to have no place in it." (Opinion, P. 15)

The Court ordered moving counsel to pay a fine of $5,000.00. In Oleck v. Fischer, supra, Judge Lasker declared:

> "Finally, the fact that defendants' counsel have known, for at least one year, of Labaton's attendance at the critical meetings and the possibility of his being a material witness is entitled to some weight. This motion could have been made far earlier when substitution would have represented less of a hardship to plaintiffs." (Opinion, P. 3)

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

MILBERG & WEISS
Attorneys for Appellees,
John P. Foley, Jr. et al
One Pennsylvania Plaza
New York, N.Y. 10001
(212) 594-5300

Of counsel:

Melvyn I. Weiss
Lawrence Milberg
Samuel H. Turetsky

Service of 2 copies of the within BRIEF is hereby admitted this 20th day of JUNE 1975

Signed [illegible]

Attorney for Appellant

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 - 966-3906

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